Supreme Court of the United States.

October Term, 1913.

THE UNITED STATES, *Appellant*, v. NELSON P. VULTE. } No. 256.

APPEAL FROM THE COURT OF CLAIMS.

SUPPLEMENTAL BRIEF FOR APPELLEE.

1. On the former argument, March 10, 1914, it was asked whether the construction now contended for by the claimant had ever been made by any responsible administrative officer. Such construction was made:

(*a*) By the Paymaster of the Marine Corps, June 26, 1906, on the act of 1906, in his letter, *post*, pp. 4–6, quoted in the Comptroller's decision of July 21, 1906. He directs the Assistant Paymaster "to continue to pay the foreign-service pay heretofore authorized for the officers and enlisted men of the Marine Corps serving in Hawaii until the Comptroller of the Treasury may, in specific terms, decide that such is not in accordance with his view of the law."

(*b*) The Judge-Advocate-General of the Army, the highest law officer of the War Department, has, in an official compilation of Military Laws, as shown in our original brief (p. 20), construed the act of 1908 as merely reaffirming the broad and general provisions of the acts

of 1901 and 1902 for an increase of pay for all service beyond the States and Territories of the Union.

2. Inquiry was also made on the former hearing in regard to the decision of the Comptroller on the question at issue.

Appendix A, *post*, p. 4, gives the decision in full upon the act of June 12, 1906, and Appendix B, *post*, p. 10, that upon the act of May 11, 1908.

These decisions were by the Assistant Comptroller, who is empowered by the act of July 31, 1894, Sec. 3 (28 Stat. L. 205–206), to "perform such duties as may be prescribed by the Comptroller of the Treasury," etc.

These adverse decisions were by an officer of no high departmental rank, and were opposed to the construction of the law by other administrative officers. The correctness of these decisions was promptly challenged by this very suit. They are therefore of little authority. *Swift Co.* v. *United States*, 105 U. S. 691, 695; *United States* v. *Graham*, 110 U. S. 219, 221; *United States* v. *Tanner*, 147 U. S. 661, 663; *United States* v. *Alger*, 152 U. S. 384, 397; *Webster* v. *Luther*, 163 U. S. 331, 342.

3. In our original brief, pp. 28–30, attention was called to the decision of this court in *Plummer* v. *United States*, 224 U. S. 137, holding that "the purpose of Congress to equalize as far as possible the pay of Army and Navy officers" by the two acts of May 11 and May 13, 1908, must control the construction of the terms used in the naval act of May 13, although the exact phrase used had theretofore been construed by this court in another sense.

This purpose "to place the pay of the Navy on the same basis as the Army pay" is shown in the "Statement of Managers on the Part of the House" of the conference committee on that bill. See House Report

No. 1639, 60th Congresss, 1st Session, p. 7, added hereto as Appendix C, *post*, p. 14.

As the officers of the Navy have received under the Navy act of May 13, as is clearly correct, the increase of pay here claimed by a Marine officer under the act of May 11, the principle of equality demands that the increase of pay shall be allowed him, as claimed.

GEORGE A. KING,
WILLIAM B. KING,
Attorneys for Appellee.

APPENDIX A.

From Decisions of Comptroller of the Treasury, Vol. XIII, pages 33-37.

Increased Pay to Officers and Enlisted Men of Marine Corps for Service in Porto Rico, Hawaii, and Island of Midway.

Commissioned officers and enlisted men of the Marine Corps, serving in Porto Rico (including the Island of Culebra) and Hawaii during the fiscal year ending June 30, 1907, are excepted by the act of June 12, 1906, from the class of beneficiaries provided by the act of June 30, 1902, are not entitled to the increased pay provided by that act for service beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto.

Commissioned officers and enlisted men of the Marine Corps, serving at stations in the Island of Midway, are not excepted by the act of June 12, 1906, from the class of beneficiaries provided by the act of June 30, 1902, and are entitled to the increased pay provided by that act for service beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto, said island not being a part of Hawaii.

(Assistant Comptroller Mitchell to the Secretary of the Navy, July 21, 1906.)

I have received by your reference with request for decision of the question therein presented the following letter dated June 26, 1906, from Col. G. C. Goodloe, paymaster, United States Marine Corps:

"1. This office has this date addressed the following communication to the assistant paymaster, United States Marine Corps, Berkeley, Cal.:

"'1. This office is in receipt of your telegram, dated the 26th inst., as follows:

"'"Marine Corps, for Paymaster, Washington, D. C.

"'"Under army appropriation act am withholding from June 12 increased pay foreign service marines, Honolulu.—Powell, A. P. M."'

"2. Your attention is invited to the decision of the Comptroller of the Treasury, dated June 22, 1904 (10 Comp. Dec. 849), which, as this office understands it, has set at rest the question as to whether the foreign-service pay of officers and enlisted men of the Marine Corps is governed by such limitations of the amounts of money appropriated as may be contained in acts making appropriations for the support of the Army, unless in the language of the act contemplated there is contained in specific terms an express repeal of the statutes which have theretofore granted this increase. This office sees nothing in the act approved June 12, 1906, making appropriations for the support of the Army for the fiscal year ending June 30, 1907, which can be construed as such a repeal of the act of March 2, 1901 (31 Stat. 903), but if such should be otherwise, it remains clear that the act of March 3, 1901 (31 Stat. 1108), at least has not been repealed. This later enactment contains a specific grant to the Marine Corps of that which was authorized by the prior act under the terms of section 1612, Revised Statutes, and, as this office understands the law, even though the former act may be specifically repealed, which is not admitted, the officers and enlisted men of the Marine Corps may continue to properly receive the foreign-service pay authorized by the later law until such be likewise repealed. You are therefore directed to continue to pay the foreign-service pay heretofore authorized for the officers and enlisted men of the Marine Corps serving in Hawaii until the Comptroller of the Treasury may in specific terms decide that such is not in accordance with his view of the law.

"2. It is respectfully suggested that the question therein presented, which this office has conditionally passed upon, may be submitted to the Department with the recommendation that the Secretary of the Navy request a decision thereon by the Comptroller of the Treasury, which decision is desired for the guidance of the paymaster's department of the corps in future payments

of foreign-service pay under the jurisdiction of the Navy Department, not only to the officers and enlisted men serving in the Hawaiian Islands, including the Island of Midway, but also to those serving in the Island of Porto Rico, including Culebra, West Indies."

The act of June 30, 1902 (32 Stat. 512), making appropriation for the support of the Army for the fiscal year 1903, provides—

"For additional twenty per centum increase on pay of enlisted men, $1,771,480.34.

"For additional ten per centum increase on pay of commissioned officers serving at foreign stations, $451,456: *Provided*, That hereafter the pay proper of all commissioned officers and enlisted men serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law for time of peace, and the time of such service shall be counted from the date of departure from said States to the date of return thereto."

The act of April 23, 1904 (33 Stat. 266), making appropriations for the support of the Army for the fiscal year 1905, provides—

"For additional twenty per centum increase on pay of enlisted men serving in the Philippine Islands, the Island of Guam, Alaska, China, and Panama, $533,412.51.

"For additional ten per centum increase on pay of commissioned officers serving in the Philippine Islands, the Island of Guam, Alaska, China, and Panama, $167,426.30; * * * and all laws or parts of laws inconsistent with the provisions of this act are hereby repealed."

The act of June 12, 1906 (34 Stat. 247), Public No. 224, making appropriation for the support of the Army for the fiscal year 1907, provides—

"For additional twenty per centum increase on pay of enlisted men serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto (excepting Porto Rico and Hawaii), as provided by act approved June 30th, 1902, the time of such service to be counted from the date of departure from said States to the date of return thereto, $540,369.48.

"For additional ten per centum increase on pay of commissioned officers serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto (excepting Porto Rico and Hawaii), as provided by act approved June 30th, 1902, the time of such service to be counted from the date of departure from said States to the date of return thereto, $200,201.39: *Provided*, That the appropriations for the pay of the Army for the fiscal years ending June 30th, 1905, and June 30th, 1906, shall be available for the payment of the increase for service at foreign stations to which commissioned officers and enlisted men are entitled under the provisions of the act of June 30th, 1902. * * *"

By section 1612 of the Revised Statutes, officers and enlisted men of the Marine Corps are entitled to the same pay as or may be provided by law for officers and enlisted men of like grades in the infantry of the Army, and by virtue of said section and the act of March 3, 1901 (31 Stat. 1108), they are entitled to the increase of pay provided by the act of June 30, 1902.

In 10 Comp. Dec. 849, it was held that—

"The act of April 23, 1904, which provided for an increase in the pay of commissioned officers and enlisted men of the Army serving in the Philippine Islands, Guam, Alaska, China, and Panama, did not operate as a repeal of the provision in the act of June 30, 1902, for an increase in the pay of commissioned officers and enlisted men of the Army serving beyond the limits of the United States; and therefore commissioned officers and enlisted men of the Marine Corps serving beyond the

limits of the United States are entitled, under the act of March 3, 1901, to the increased pay provided for by said act of June 30, 1902."

The act of June 30, 1902, declared that commissioned officers and enlisted men of the Army serving at stations beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto should receive the higher rate of pay, without limitation as to time. The act of April 23, 1904, without in any way referring to the act of June 30, 1902, made an appropriation to pay the higher rate of pay to commissioned officers and enlisted men serving at the particular places therein named, and it was held in the above decision that the latter act was not inconsistent with or repugnant to the act of June 30, 1902. In other words, the mere fact that Congress by the act of April 23, 1904, appropriated to pay the higher rate of pay to said officers and men serving in the places therein named did not abrogate or repeal the above provision of the act of June 30, 1902.

The act of April 23, 1904, did not refer to or mention the act of June 30, 1902, and it covered but a part of the subject-matter of the act of June 30, 1902.

The act of June 12, 1906, covers the whole subject-matter of the act of June 30, 1902, expressly refers to, and I am of opinion it is a limitation upon that act. I am of opinion that by the act of June 12, 1906, Congress intended to revise the class of beneficiaries as provided by the act of June 30, 1902, and to except therefrom all commissioned officers and enlisted men serving at stations in Porto Rico and Hawaii. In other words, by the act of June 12, 1906, for the fiscal year ending June 30, 1907, commissioned officers and enlisted men serving in Porto Rico and Hawaii are excepted from the class of beneficiaries provided by the act of June 30, 1902, and are not entitled to said higher rate of pay.

I am also of opinion that commissioned officers and enlisted men of the Marine Corps serving in Porto Rico, including the island of Culebra as part of Porto Rico, and Hawaii during the fiscal year ending June 30, 1907, are not entitled for such service to the increased pay provided by the act of June 30, 1902. I am also of opinion that commissioned officers and enlisted men of the Marine Corps serving at stations in the island of Midway are entitled for such service to said higher pay, for the reason that, as I understand, said island is not a part of Hawaii.

APPENDIX B.

From Decisions of Comptroller of the Treasury, Vol. XIV, pages 841–846.

Foreign-Service Pay for Service in Porto Rico and Hawaii.

[As only a portion of this decision relates to the question here involved, only the part material to this question is here given.]

* * * * * * *

The increase of pay provided by the act of May 11, 1908, for foreign service of officers and enlisted men of the Army during the fiscal year 1909, is not payable to officers and enlisted men of the Regular Army, and of the Porto Rico Provisional Regiment for service in Porto Rico and Hawaii after June 30, 1908.

* * * * * * *

(Assistant Comptroller Mitchell to the Secretary of War, June 2, 1908.)

I have received your communication of the 21st instant requesting my decision of questions presented by the Paymaster-General of the Army, as follows:

"With reference to the Army appropriation act for the fiscal year 1909, approved May 11, 1908 (Public 112), I have the honor to request that the decision of the Comptroller of the Treasury be obtained for the guidance of officers of the Pay Department upon the following questions having relation to payments to be made under said act:

* * * * * * *

"2. The act of June 12, 1906 (34 Stat. 247), and the act of March 2, 1907 (34 Stat. 1164), provided that—

"'For additional twenty per centum increase on pay of enlisted men serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto (excepting Porto Rico and Hawaii), as provided by act approved June 30, 1902'—

"and the same wording is used in the appropriation for ten per centum increase on pay of officers serving beyond the limits of the States.

"The act of May 11, 1908, makes an appropriation for foreign-service increase, but does not contain the provision exempting service in Porto Rico and Hawaii from its benefits. Decision is therefore requested whether, after June 30, 1908, foreign-service increase is payable to officers and enlisted men of the Regular Army serving in Porto Rico and Hawaii, and to officers and men of the Porto Rico Provisional Regiment of Infantry.

* * * * * * *

The three questions submitted will be taken up and considered in their order.

* * * * * * *

QUESTION 2.

The act of June 30, 1902 (32 Stat. 512), making appropriation for the support of the Army for the fiscal year 1903, provides:

"For additional twenty per centum increase on pay of enlisted men, $1,771,480.34.

"For additional ten per centum increase on pay of commissioned officers serving at foreign stations, $451,-456: *Provided*, That hereafter the pay proper of all commissioned officers and enlisted men serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law for time of peace, and the time of such service shall be counted from the date of departure from said States to the date of return thereto."

The act of June 12, 1906 (34 Stat. 247), making appropriation for the support of the Army for the fiscal year 1907, provides:

"For additional twenty per centum increase on pay of enlisted men serving beyond the limits of the States com-

prising the Union and the Territories of the United States contiguous thereto (excepting Porto Rico and Howaii), as provided by act approved June 30th, 1902, the time of such service to be counted from the date of departure from said States to the date of return thereto, $540,-369.48.

"For additional ten per centum increase on pay of commissioned officers serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto (excepting Porto Rico and Hawaii), as provided by act approved June 30th, 1902, the time of such service to be counted from the date of departure from said States to the date of return thereto, $200,201.39: *Provided*, That the appropriations for the pay of the Army for the fiscal years ending June 30th, 1905, and June 30th, 1906, shall be available for the payment of the increase for service at foreign stations to which commissioned officers and enlisted men are entitled under the provisions of the act of June 30th, 1902. * * * ."

The act of March 2, 1907 (34 Stat. 1164), making appropriation for the support of the Army for the fiscal year 1908, contains a provision identical in terms with the act of June 12, 1906, except as to the amount appropriated.

In 13 Comp. Dec. 33, it was held that commissioned officers and enlisted men serving in Porto Rico and Hawaii during the fiscal year 1907 were excepted by the act of June 12, 1906, *supra*, from the class of beneficiaries provided by the act of June 30, 1902, *supra*, and were not entitled during said fiscal year to the increase of pay provided by said act of June 30, 1902, for service beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto. The same exception applies to men serving in said places during the fiscal year 1908.

The act of May 11, 1908 (Public No. 112, pages 6 and

10), making appropriation for the support of the Army for the fiscal year 1909, provides:

"* * * That increase of pay for service beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto shall be as now provided by law. * * *

"For additional ten per centum increase on pay of officers on foreign service, $285,000.

"For additional twenty per centum increase to enlisted men on foreign service, $767,000: * * *"

The increase of pay for foreign service provided by law at the time of the approval of the act of May 11, 1908, was that authorized by the act of June 30, 1902, as limited by the act of March 2, 1907, making appropriation for the fiscal year 1908.

As under said laws increase of pay for foreign service was not given to commissioned officers and enlisted men serving in Porto Rico and Hawaii, such persons are not entitled to said increase of pay under the act of May 11, 1908, *supra*. The effect of the above provision in the act of May 11, 1908, is to continue the limitation imposed by the act of March 2, 1907, and under said provision I am of opinion that increase of pay for foreign service after June 30, 1908, is not payable to the officers and enlisted men of the Regular Army and the officers and men of the Porto Rico Provisional Regiment of Infantry serving in Porto Rico and Hawaii.

APPENDIX C.

Extract from Statement of Managers on the Part of the House, annexed to Conference Report on Naval Appropriation Act of May 13, 1908, House Report No. 1639, 60th Congress, 1st Session, page 7.

Amendment No. 2 provides for the pay of all officers and enlisted men of the Navy. This amendment places the pay of the Navy on the same basis as the army pay or as near as it is possible to do so, as provided in the bill (H. R. 17288) as amended by the Senate and agreed to in conference by both Houses making appropriation for the support of the Army for the fiscal year ending June 30, 1909. This amendment provides for an increase of $500 in all the grades from rear-admiral to ensign, with the exception of the grade of lieutenant, which is increased $600 and that of ensign $300 per annum. It provides for the 10 per cent longevity up to 40 per cent, provided that the pay of a captain shall not exceed $5,000 per annum; of commander $4,500 per annum, and of lieutenant-commander $4,000 per annum. It likewise provides for a 10 per cent increase for all officers on sea duty and all officers on shore duty beyond the continental limits of the United States. This provides for the officers of the Navy the same additional pay as enjoyed by officers of the Army when performing similar duty.

It also provides for the pay of midshipmen at the Naval Academy in the same manner as is provided for cadets at the Military Academy and increases the pay of midshipmen after graduation from the Naval Academy from $950 to $1,400 per annum. It also provides for an increase of 10 per cent for all enlisted men of the Navy on the active and on the retired list.

The amendment also provides that the chiefs of bureaus in the Navy Department shall have the highest pay of the grade to which they belong, placing them on the same basis as officers holding like positions in the Army, and likewise placing the pay of chaplains on the same basis as provided in the Army. Aids to rear-admirals are

granted a similar increase to that provided in the Army.

An officer of the Navy after having had thirty years' service may upon his own application, in the discretion of the President, retire from active service and be placed on the retired list, thereby placing the Navy on the same basis as other branches of the military service in this respect. And the House recedes from its disagreement and agrees to the Senate amendment as above amended.

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No. 256.

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

THE UNITED STATES, APPELLANT,

v.

NELSON P. VULTE.

APPEAL FROM THE COURT OF CLAIMS.

REPLY BRIEF FOR THE UNITED STATES.

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APPEAL FROM THE COURT OF CLAIMS.

REPLY BRIEF FOR THE UNITED STATES.

Reply to appellee's brief becomes necessary for the reason that the Government differs with appellee in respect to many statements set forth in his brief.

The first subject to which we invite the attention of the court is the construction placed upon the decision of the Comptroller of the Treasury (10 Comp. Dec., pp. 849–852), dealing with increase of pay to officers and enlisted men of the Marine Corps serving beyond the limits of the United States and Territories contiguous thereto.

In their brief, on page 4, counsel for appellee say:

> The decision of the Comptroller of the Treasury, referred to by the court toward the close of its opinion (Rec., p. 5), is so pertinent and

applicable to the question in this case that it is annexed to this brief as an appendix (*post*, pp. 32–35).

This decision held that the appropriation of April 23, 1904 (33 Stat. L., 266), amounted only to "a failure to appropriate sufficient money to pay the increased pay for the fiscal year 1905, so far as the Army is concerned."

As the appropriations for the Marine Corps were made simply in general terms for "pay and allowances prescribed by law," etc., he held that there was not even a failure to appropriate, and that those serving in the Marine Corps were entitled to receive ten per cent increase pay, while serving in Porto Rico and Hawaii, out of the current appropriation made by the act of 1904 for the year ending June 30, 1905.

The part to which we particularly object is underlined.

In order that we may show wherein this statement is incorrect, it becomes necessary for us to go into the history of the legislation dealing with increases of pay for service outside of the United States and contiguous territories.

ARMY APPROPRIATION ACT OF MAY 26, 1900 (31 Stat L., 211).

This act making appropriations for the support of the Army for the fiscal year of 1901 provides:

> For additional twenty per centum increase of pay of enlisted men, $4,524,715: *Provided*, That hereafter the pay proper of all officers and

> enlisted men serving in Porto Rico, Cuba, the Philippine Islands, Hawaii, and in the Territory of Alaska shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law in time of peace.

We have called attention to this act in order to show that from time to time Congress has increased or diminished the territorial definition of "foreign stations." It did this presumably because it was attempting in its legislation to follow the movements of the Army.

ARMY APPROPRIATION ACT OF MARCH 2, 1901 (31 Stat. L., 903).

This act, making appropriations for the support of the Army for the fiscal year of 1902, provides:

> For additional ten per centum increase on pay of officers serving at foreign stations, $500,000: *Provided*, That hereafter the pay proper of all officers and enlisted men serving beyond the limits of the States comprising the Union, and the Territories of the United States contiguous thereto, shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law for time of peace, and the time of such service shall be counted from the date of departure from said States to the date of return thereto: *Provided further*, That the officers and enlisted men who have served in China at any time since the twenty-sixth day of May, nineteen hundred, shall be allowed and paid for such

service the same increase of pay proper as is herein provided for.

The proviso attached to this act giving increased pay to the men who "served in China at any time since the 26th day of May, 1900," indicates that Congress intended to give increased pay for back service from May 26, 1900, to March 2, 1901, to the men who had served in China, because China had not been designated as a foreign station in the act of May 26, 1900.

ARMY APPROPRIATION ACT OF JUNE 30, 1902 (32 Stat. L. 512).

This act, making appropriations for the fiscal year of 1903, provides:

> For additional ten per centum increase on pay of commissioned officers serving at foreign stations, $451,456: *Provided*, That hereafter the pay proper of all commissioned officers and enlisted men serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law for time of peace, and the time of such service shall be counted from the date of departure from said States to the date of return thereto.

The act of June 30, 1902, is identical with the act of 1901, except that the word "commissioned" has been inserted before the word "officers."

ACT OF JULY 1, 1902 (32 Stat. L., 560).

At this point the attention of the court is called to an act which undoubtedly controlled the disbursement of the paymasters of the Army in 1904, and influenced the Comptroller of the Treasury when rendering his decision for the paymaster of the Marine Corps dealing with increase of pay to officers and enlisted men of the Marine Corps serving beyond the limits of the United States, *supra*, which will be examined in this brief hereafter in connection with another act.

It is as follows:

> Hereafter no act of Congress shall be construed to make an appropriation out of the Treasury of the United States unless such act shall, in specific terms, declare an appropriation to be made for the purpose or purposes specified in the act.

In 1904, however, Congress, for the first time since 1900, defined in specific terms the territorial limits within which a foreign station could be located.

ARMY APPROPRIATION ACT OF APRIL 23, 1904 (33 Stat. L., 266).

This act, making appropriations for the support of the Army for the fiscal year of 1905, provides:

> For additional twenty per centum increase on pay of enlisted men serving in the Philippine Islands, the Island of Guam, Alaska, China, and Panama, $533,412.51.
>
> For additional ten per centum increase on pay of commissioned officers serving in the Philippine Islands, the Island of Guam,

> Alaska, China, and Panama, $167,426.30; * * * and all laws or parts of laws inconsistent with the provisions of this act are hereby repealed.

The act of April 23, 1904, not only defined the territorial limits of foreign stations specifically, but added a repealing clause and failed to appropriate increased pay for service at stations not named in the act.

On May 31, 1904, the Comptroller of the Treasury received a request for an opinion from Lieut. Col. George Richards, Paymaster of the Marine Corps, as to whether the act of April 23, 1904, operated to repeal the provisions of the act of June 30, 1902, in so far as officers and enlisted men of the Marine Corps serving at Sitka, Alaska; Hawaii, and the Island of Midway, in the Pacific, were concerned. (Appendix A to this brief.) In reply to this request the Comptroller of the Treasury rendered the decision found in volume 10, page 849, Comptroller's Decisions, and set out in full in the appendix to appellee's brief. The counsel for appellee contend that this decision of the comptroller held that officers of the "Marine Corps were entitled to receive ten per cent increase pay, while serving in Porto Rico and Hawaii, out of the current appropriation made by the act of 1904 for the year ending June 30, 1905."

The comptroller, in his decision, says:

> The provisions of the act of April 23, 1904, *supra*, contain no express repeal of the prior acts, but there has been a failure to appro-

priate sufficient money to pay the increased pay for the fiscal year 1905, so far as the Army is concerned, beyond that found in the latter act. [Act of Apr. 23, 1904.]

Where a prior act contains an express grant in prospective, I do not think a mere failure to appropriate money sufficient to pay that authorized by the prior acts can be construed as a repeal of said prior acts.

Reading these two paragraphs in the light of the question propounded to the comptroller by Col. Richards and in connection with the rest of his decision, we find it to mean as follows:

That the act of 1904, while appropriating moneys for the additional pay for service at the foreign stations named therein, did not appropriate moneys for additional service at stations outside of those designated in the act of 1904, and therefore there was no money to allow additional pay at the places named by Col. Richards.

The comptroller held that simply because Congress had failed to appropriate for stations outside the Philippine Islands, the island of Guam, Alaska, China, and Panama, it did not repeal the act of 1902, so far as stations outside of the aforenamed places are concerned. He stated, in substance, that he did not think that the language used in the act of 1904, limiting the definition of territory comprehending foreign stations, to be in conflict with the general language of the act of 1902 describing foreign territory to be any territory outside of the United States or the territories contiguous thereto.

Further, replying to Col. Richards, the Comptroller of the Treasury said that he did not see any reason why the officers and enlisted men of the Marine Corps might not be paid the increased pay provided by the acts of June 30, 1902, and March 3, 1901, *supra*. This, of course, should be considered in connection with what he had already said, that while the acts of 1901 and 1902 were not repealed by the act of 1904, there was no money in the appropriation act of 1904 to give additional pay to men serving at stations not named in that act.

It will thus be seen that the appellee is in error when he says that this decision of the Comptroller of the Treasury held that those serving in the Marine Corps were entitled to receive 10 per cent increase pay while serving in Hawaii and Porto Rico out of the current appropriation made by the act of 1904 for the year ending June 30, 1905.

As we have already said, the Comptroller of the Treasury in rendering his opinion was governed by the act of July 1, 1902, *supra*, which limited the payment for additional service at foreign posts to those stations named in the act of 1904.

ARMY APPROPRIATION ACT OF MARCH 2, 1905 (33 Stat. L., 832).

This act appropriating for the support of the Army for the fiscal year of 1906 described the territorial definition of foreign stations in terms identical with those of the act of April 23, 1904, and appropriated exactly the same amount.

ARMY APPROPRIATION ACT OF JUNE 12, 1906 (34 Stat. L., 247).

On June 12, 1906 (34 Stat. L., 247), Congress provided—

> For additional 10 per cent increase on pay of commissioned officers serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto (excepting Porto Rico and Hawaii), as provided by act approved June 30, 1902, the time of such service to be counted from the date of departure from said States to the date of return thereto. * * *

It has been conceded by appellee that for the fiscal years ending June 30, 1905, and June 30, 1906, the accounting officers had refused to pay enlisted men or officers of the Marine Corps or the Army additional pay for services outside of the Philippine Islands, the island of Guam, Alaska, China, and Panama, designated as stations in the act of April 23, 1904.

By the act of June 12, 1906, however, Congress specifically *excepted Porto Rico and Hawaii* from the definition of foreign stations wherein additional pay for services would be granted, using language in connection with the exception identical with that used in the act of 1902 in describing foreign stations where additional pay would be granted for services. At the same time Congress referred to the act of June 30, 1902, in such a way as to indicate an intention to amend the act so as to exclude them in the future.

Thus far the act of 1906 was looking to the future, but at the end of the act there was a proviso added

in which Congress was looking back to the past. This proviso declared that the appropriations for the pay of the Army for the fiscal years ending June 30, 1905, and June 30, 1906, should be available for increased pay for service at foreign stations to which commissioned officers and enlisted men were entitled under the provisions of the act of June 30, 1902. In other words, Congress said that whatever was left of the appropriations made in the acts of 1904 and 1905 could be used to give additional pay for foreign service to those who had served at stations not mentioned in the acts of 1904 and 1905, but who did come within the definition of foreign territory where additional pay would be allowed, as described by the act of 1902. There was a reason for this. The decision of the comptroller of June 22, 1904, heretofore referred to, held that the appropriation of 1904 could not be used for that purpose, and the paymasters refused to give such additional pay to officers serving at stations not named in the acts of 1904 and 1905.

It would seem to us very apparent that Congress said, in substance, that as the comptroller had held that the act of 1904 did not repeal *pro tanto* the act of 1902 in so far as the definition of foreign stations was concerned, it would add this proviso, so as to conform to the ruling of the comptroller during the past, but that it would now expressly state by using the words "excepting Porto Rico and Hawaii" that for the future it would no longer consider those places as foreign territory wherein additional pay would be allowed for services.

The same comptroller evidently understood what was meant by the express exception of Porto Rico and Hawaii in the act of June 12, 1906, for he rendered a decision through his assistant on July 21, 1906, construing the act of 1906 to mean that Porto Rico and Hawaii were permanently excepted from the definition of foreign territory where increased pay for services would be allowed. This decision is found in Volume XIII, Comptroller's Decisions, pages 33, 37, and in appendix "B" to this brief.

ARMY APPROPRIATION ACT OF MARCH 2, 1907 (34 Stat. L., 1164).

This act made appropriation for the support of the Army for fiscal year of 1908. It contains a provision identical in terms with the act of June 12, 1906, except as to the amount appropriated.

ARMY APPROPRIATION ACT OF MAY 11, 1908 (35 Stat. L., 108).

This act making appropriations for the support of the Army for the fiscal year of 1909 provided:

> That increase of pay for service beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto shall be as now provided by law.

The phrase "as now provided by law" at the time of the passage of the act was undoubtedly intended to refer to the territorial limits for foreign service where additional pay would be allowed as defined in the respective acts of June 12, 1906, and March 2, 1907. The words "as now provided by law" were so understood by the same comptroller who had rendered

the decisions construing the acts of 1904 and 1906. This last decision construing the act of 1908 was drafted by Assistant Comptroller Mitchell and is found in XIV Comptroller's Decisions, pages 841–846, and in Appendix C to this brief.

The act of June 12, 1906, having been construed by the comptroller and the act of May 11, 1908, having been prepared with reference to the act of 1906, so far as the definition of foreign stations was concerned, must necessarily refer back to the territorial definition of foreign stations as set forth in the act of 1906 and as construed by the comptroller. (*Sessions* v. *Romadka*, 145 U. S., 41, 42; *Claflin & Others* v. *Commonwealth Insurance Company*, 110 U. S., 81; *The "Abbotsford,"* 98 U. S., 440; *Plummer* v. *United States*, 224 U. S., 137, 140.)

The Army appropriation acts of 1909, 1910, and 1911, respectively, simply make appropriation for services outside the limits of the United States and the Territories contiguous thereto in conformity with existing law as construed by the comptroller.

ARMY APPROPRIATION ACT OF AUGUST 24, 1912 (37 Stat. L., 576).

This act makes appropriations for the support of the Army for the fiscal year of 1913, in the following clause:

> That hereafter the laws allowing increase of pay to officers and enlisted men for foreign service shall not apply to service in the Canal Zone, Panama, or Hawaii, or Porto Rico.

It became necessary to redefine the territorial limits wherein additional pay for foreign service would be allowed in the year 1912, so Congress redefined the territorial limits of foreign stations in this act by cutting out the Canal Zone, Panama, Hawaii, and Porto Rico.

Since the passage of the act of 1906, the accounting officers of the Treasury have uniformly disallowed increased pay for service in Porto Rico and Hawaii. Such contemporaneous, uniform, and continuous construction is, we submit, entitled to great weight and should not be overruled without cogent reasons. (*Brown* v. *United States*, 113 U. S., 568; *Schells, executor*, v. *Fouche*, 138 U. S., 562; *Hewitt* v. *Shultz*, 180 U. S., 139; *United States* v. *Healey*, 160 U. S., 136; *United States* v. *Sweet*, 189 U. S., 471.) When such construction has been approved by Congress, as was done by the act of 1912, it is conclusive.

REASONS FOR ALLOWING INCREASED PAY FOR NAVAL SERVICE IN PORTO RICO AND HAWAII.

Counsel for appellant says (p. 28, brief):

> Any possible doubt of the intention of Congress is removed by a comparison of the statute of May 11, 1908, increasing the pay of the Army, with the contemporaneous statute of May 13, 1908, increasing the pay of the Navy. (35 Stat. L., 108–110, 127, 128.)

The Navy act says (35 Stat. L., 128):

> All officers on sea duty and all officers on shore duty beyond the continental limits of

> the United States shall while so serving receive ten per centum additional of their salaries and increase as above provided, and such increase shall commence from the date of reporting for duty on board ship or the date of sailing from the United States for shore duty beyond the seas or to join a ship in foreign waters.

Counsel further calls attention to the case of *Plummer* v. *The United States* (224 U. S., 137) and quotes therefrom the following language (p. 144):

> In view of the purpose of Congress *to equalize as far as possible* the pay of Army and Navy officers, manifested by the adoption of the Navy personnel act of 1899 and in all subsubsequent legislation as to such pay, etc. (Italics ours.)

It is apparent from the use of the phrase "to equalize as far as possible" that this court had in mind the possibility that the pay of Army and Navy officers could not be exactly the same, and so used the phrase quoted.

It will be observed that the question in the Plummer case arose out of a difference over longevity pay to which the appellant contended he was entitled. Longevity pay is computed upon base pay. Mr. Justice White in the quotation in counsel's brief was, as we understand it, speaking about the intention of Congress to keep the base pay and longevity pay of officers of the Army and the Navy as nearly equal as possible, but base pay, in the very nature of things, can not be measured by conditions of service

for which "extra pay" would be allowed. Additional or extra pay, as presented in the case at bar, is determined by the hazardous or onerous character of the service, while longevity pay is based on length of service.

The reason why the pay of Army and Navy officers is not exactly the same is accounted for by the difference in the character of the service. For instance, a Naval officer while on sea duty is frequently put to a greater expense by being compelled to maintain two establishments. On the other hand, an Army officer stationed at Porto Rico may establish his family in barracks furnished for the Army, and his situation, so far as expense is concerned, would be similar to that when stationed in the United States.

Again, there would be a difference between the expenses incurred by a naval officer assigned to shore duty at Porto Rico, and an Army officer living in barracks at the same place. The naval officer would be compelled necessarily to reside in hotels or boarding houses, where his expenses would be greater than those of an Army officer in quarters.

It would therefore appear, generally speaking, that there is a reason for not limiting the definition of territory where additional pay should be granted for foreign service so far as naval officers are concerned. But, regardless of the reasons applying to naval officers it is clear from the action of Congress in passing the Army appropriation act of 1912, supra, a distinction was again made, so far as certain territory

was concerned, with respect to additional pay of Army officers for the future, since the act of 1912 specifically declared that there should not be increased pay for service in the Canal Zone, Panama, Hawaii, or Porto Rico. Can it not be fairly presumed that Congress drew this distinction because the service was no longer onerous or dangerous? This question had been before Congress from 1904 on, and it is shown by the Congressional Records in 1904 that Congress made a distinction with regard to Army officers on the ground of onerous service. (See Senate committee report on this provision in act of Apr. 23, 1904, 33 Stat., 264–265; Government's original brief, p. 10.)

The provision upon which the committee reported is as follows:

> For pay of the enlisted men of the Army on the retired list, eight hundred and two thousand four hundred and ninety-eight dollars: *Provided*, That hereafter in computing the length of service for retirement credit shall be given soldiers for double the time of their actual service in China, Cuba, the Philippine Islands, the island of Guam, Alaska, and Panama; but double credit shall not be given for service hereafter rendered in Porto Rico or the Territory of Hawaii.

This distinction could also have been drawn because shore duty beyond seas as a general proposition was more dangerous than shore duty at home, due to the diseases of tropical climates and the

hardships of winters in territories such as Alaska. But in Porto Rico, Hawaii, and Panama, where this Government has obtained a firm foothold and which have become in effect a part of the United States, tropical diseases have been practically eliminated. Some of these territories are now regarded as health resorts and service there considered desirable.

ILLUSTRATION OF THE MEANING OF THE PHRASE "TO EQUALIZE AS FAR AS POSSIBLE," AS APPLIED TO THE DIFFERENCE BETWEEN ARMY AND NAVY PAY.

The meaning of the phrase "to equalize as far as possible," as applied to the difference between Army and Navy pay, is illustrated by the status of an acting assistant surgeon in the Navy, as shown in the Plummer case, *supra*, and that of an acting assistant, or contract, surgeon in the Army, as stated in section 2 of the act of May 12, 1898 (30 Stat., 406). According to the decision in the Plummer case, an acting assistant surgeon had the same rank and pay as an assistant surgeon in the regular service, which was as follows: At sea, $1,650 a year; on shore with quarters, $1,402.50; on shore without quarters, $1,690.50 a year. An acting assistant surgeon in the Navy also had the rank of lieutenant (junior grade).

On the other hand, contract surgeons in the Army, who were also known as acting assistant surgeons, were appointed under section 2 of the act of May 12, 1898, where it was provided as follows (sec. 2):

> That in emergencies the Surgeon General of the Army, with the approval of the Secretary of War, may appoint as many contract

surgeons as may be necessary, at a compensation not to exceed one hundred and fifty dollars per month.

It will thus be seen that an acting assistant surgeon in the Navy was given rank, and therefore entitled to 10 per cent increase for foreign service and longevity pay, while a contract surgeon in the Army received a salary *not to exceed* $150 a month, and, having no rank, was not entitled to longevity or increased pay for foreign service, although both performed practically the same duties.

The Army Regulations of 1901, paragraph 1574, declares that a contract surgeon in the Army is "not entitled to commutation of quarters, nor the 10 per cent increase of pay when serving beyond the territorial limits of the United States," while an acting assistant surgeon in the Navy under the law would be.

In the case of *Byrne* v. *United States* (26 C. Cls., 302–306) it was held that an acting assistant surgeon in the Army had no rank and was not entitled to longevity pay.

On October 22, 1900, the comptroller held that a contract surgeon, also called acting assistant surgeon, in the Army, was not entitled to the 10 per cent increase for service in Porto Rico, Cuba, Philippine Islands, Hawaii, and Alaska above the rates of pay proper fixed by law (7 Comp., 195–196).

On November 16, 1903 (10 Comp., 424), the comptroller rendered a decision holding that an officer of the Army was not entitled to longevity pay for service as a contract or acting assistant surgeon, and referred

for authority to his decision in the Seventh Comptroller, above cited.

On July 4, 1909, the Solicitor General, Mr. Bowers, rendered an exhaustive opinion (27 Atty. Gen. Op., 468) on the right of an Army officer below the grade of a brigadierg eneral who served as a contract or acting assistant surgeon in the Civil War prior to April 9, 1865, to retirement with a higher grade and rank under the act of April 23, 1904 (33 Stat., 364), and citing the Byrnscase, *supra*, held that he did not come within the provisions of the act.

Respectfully submitted.

HUSTON THOMPSON,
Assistant Attorney General.

APPENDIX A.

OFFICE OF ASSISTANT PAYMASTER,
UNITED STATES MARINE CORPS,
San Francisco, Cal., May 31, 1904.

SIR: Referring to the following contained in the act approved June 30, 1902 (32 Stat., 512), making appropriations for the support of the Army for the fiscal year ending June 30, 1903, viz:

For additional twenty per centum increase on pay of enlisted men, one million seven hundred and seventy-one thousand four hundred and eighty dollars and thirty-four cents.

For additional ten per centum increase on pay of commissioned officers serving at foreign stations, four hundred and fifty-one thousand four hundred and fifty-six dollars: *Provided*, That hereafter the pay proper of all commissioned officers and enlisted men serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law for time of peace, and the time of such service shall be counted from the date of departure from said States to the date of return thereto—

it has been observed that while there is specified in the act approved March 2, 1903, making similar appropriations for the current fiscal year, an estimate for appropriation of 10 per cent increase on pay for officers and a 20 per cent increase on pay for enlisted men of the Army "serving at foreign stations," the act approved April 23, 1904 (33 Stat., 266), however, making appropriations for the support of the Army for the next fiscal year without in specific terms repealing the above-cited clause, has limited the estimate for appropriation on account of foreign service pay in the Army to the following:

For additional twenty per centum increase on pay of enlisted men serving in the Philippine Islands, the island of Guam, Alaska, China, and Panama, five hundred and thirty-three thousand four hundred and twelve dollars and fifty-one cents.

For additional ten per centum increase on pay of commissioned officers serving in the Phillipine Islands, the island

of Guam, Alaska, China, and Panama, one hundred and sixty-seven thousand four hundred and twenty-six dollars and thirty cents.

The final clause of this act stipulates in general terms: "All laws or parts of laws inconsistent with the provisions of this act are hereby repealed."

2. During the period since the enactment of the legislation of June 30, 1902, officers and enlisted men of the Marine Corps whose accounts are payable here, which come within the meaning of the clause cited, have been paid, under the provisions of section 1612 of the Revised Statutes, the increased pay for the service therein described. The appropriations for the Marine Corps have not in the past, nor do they now, contain any specific estimate for appropriations for pay for foreign service for officers and enlisted men of the Marine Corps similar to the Army acts referred to. There is contained, however, the general item for appropriation for "pay and allowances prescribed by law of officers on active list" and "pay of noncommissioned officers, musicians, and privates, as prescribed by law," which has been interpreted to cover the case.

3. On this date there are carried on rolls payable by the undersigned, accounts of officers and enlisted men of the Marine Corps, stationed at marine barracks, Sitka, Alaska, those serving at the naval station, Hawaii, Honolulu, Hawaii, and a detachment recently established at the island of Midway, Pacific Ocean, all of whose accounts appear to be in a sense affected by the above-cited laws. These accounts are being credited for payment, or for certificate for payment, by the undersigned, with the increased pay described in the act of June 30, 1902, and payment of the amounts so credited is pending at this office. An application to these cases of the principles enunciated by your office in its decisions of June 25, 1900 (6 Comp., 952); August 19, 1902 (Cir. No. 39, headquarters Army, Aug. 27, 1902); March 26, 1903 (9 Comp., 527); and in the decision of April 13, 1903 (9 Comp., 553), has created a doubt at this office respecting the propriety of the future payment of this increased pay to these officers and enlisted men from the date of the approval of the recent Army appropriation act, to wit, *April 23, 1904*.

From such discussion of this subject as appeared in public prints at the time this act was under consideration, this office believes that it was the intention of the Congress to discontinue by this enactment the foreign-service pay for service at Porto Rico, Cuba, and Hawaii; it is not understood that the matter of discontinuing this pay for service of the Marine Corps at the island of Midway was ever considered by the Congress. While the undersigned recognizes that it is the duty of your office to consider and decide this matter solely from the legal point of view and to allow only what the law allows, this office is constrained to state here a belief that if there be any service that merits an increased compensation such service will be found at the island of Midway.

4. I have the honor to request the decision of your office as to whether the enactment of April 23, 1904 (33 Stat., 266), above cited, has operated to repeal the provisions of the act of June 30, 1902, as quoted, so far as officers and enlisted men of the Marine Corps payable by this office and serving at the stations named are concerned; and if so, from what date should this office discontinue the credit and payment to such officers and enlisted men whose pay you may determine to be affected by this recent legislation.

Very respectfully,

GEORGE RICHARDS,
Lieutenant Colonel, Assistant Paymaster,
United States Marine Corps.

The COMPTROLLER OF THE TREASURY,
Treasury Department, Washington, D. C.

(Through the Brigadier General Commandant, Headquarters U. S. Marine Corps, Washington, D. C.)

APPENDIX B.

[13 Comp., 33–37.]

INCREASED PAY TO OFFICERS AND ENLISTED MEN OF MARINE CORPS FOR SERVICE IN PORTO RICO, HAWAII, AND MIDWAY.

Commissioned officers and enlisted men of the Marine Corps serving in Porto Rico (including the island of Culebra) and Hawaii during the fiscal year ending June 30, 1907, are excepted by the act of June 12, 1906, from the class of beneficiaries provided by the act of June 30,

1902, and are not entitled to the increased pay provided by that act for service beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto.

Commissioned officers and enlisted men of the Marine Corps serving at stations in the island of Midway are not excepted by the act of June 12, 1906, from the class of beneficiaries provided by the act of June 30, 1902, and are entitled to the increased pay provided by that act for service beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto, said island not being a part of Hawaii.

Assistant Comptroller Mitchell to the Secretary of the Navy, July 21, 1906:

I have received by your reference, with request for decision of the question therein presented, the following letter, dated June 26, 1906, from Col. G. C. Goodloe, paymaster, United States Marine Corps:

1. This office has this date addressed the following communication to the assistant paymaster, United States Marine Corps, Berkeley, Cal.:

"1. This office is in receipt of your telegram, dated the 26th instant, as follows:

"'Marine Corps, for paymaster, Washington, D. C.

"'Under Army appropriation act am withholding from June 12 increased pay, foreign service, marines, Honolulu.—Powell, A. P. M.'"

2. Your attention is invited to the decision of the Comptroller of the Treasury, dated June 22, 1904 (10 Comp. Dec., 849), which, as this office understands it, has set at rest the question as to whether the foreign-service pay of officers and enlisted men of the Marine Corps is governed by such limitations of the amounts of money appropriated as may be contained in acts making appropriations for the support of the Army, unless in the language of the act contemplated there is contained in specific terms an express repeal of the statutes which have theretofore granted this increase. This office sees nothing in the act approved June 12, 1906, making appropriations for the support of the Army for the fiscal year ending June 30, 1907, which can be construed as such a repeal of the act of March 2, 1901 (31 Stat., 903), but if such should be otherwise, it remains clear that the act of March 3, 1901 (31 Stat., 1108), at least has not been repealed. This later enactment contains a specific grant to the Marine Corps of that which was authorized by the prior act under the terms of section 1612, Revised Statutes, and, as this office understands the law, even though the former act may be specifically repealed, which is not admitted, the officers and enlisted men of the Marine Corps may continue to

properly receive the foreign-service pay authorized by the later law until such be likewise repealed. You are therefore directed to continue to pay the foreign-service pay heretofore authorized for the officers and enlisted men of the Marine Corps serving in Hawaii until the Comptroller of the Treasury may in specific terms decide that such is not in accordance with his view of the law.

2. It is respectfully suggested that the question therein presented, which this office has conditionally passed upon, may be submitted to the department with the recommendation that the Secretary of the Navy request a decision thereon by the Comptroller of the Treasury, which decision is desired for the guidance of the paymaster's department of the corps in future payments of foreign-service pay under the jurisdiction of the Navy Department, not only to the officers and enlisted men serving in the Hawaiian Islands, including the island of Midway, but also to those serving in the island of Porto Rico, including Culebra, West Indies.

The act of June 30 ,1902 (32 Stat., 512), making appropriation for the support of the Army for the fiscal year 1903, provides:

For additional twenty per centum increase on pay of enlisted men, one million seven hundred and seventy-one thousand four hundred and eighty dollars and thirty-four cents.

For additional ten per centum increase on pay of commissioned officers serving at foreign stations, four hundred and fifty-one thousand four hundred and fifty-six dollars: *Provided*, That hereafter the pay proper of all commissioned officers and enlisted men serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law for time of peace, and the time of such service shall be counted from the date of departure from said States to the date of return thereto.

The act of April 23, 1904 (33 Stat., 266), making appropriations for the support of the Army for the fiscal year 1905, provides:

For additional twenty per centum increase on pay of enlisted men serving in the Philippine Islands, the island of Guam, Alaska, China, and Panama, five hundred and thirty-three thousand four hundred and twelve dollars and fifty-one cents.

For additional ten per centum increase on pay of commissioned officers serving in the Philippine Islands, the island of Guam, Alaska, China, and Panama, one hundred and sixty-seven thousand four hundred and twenty-six dollars and thirty cents; * * * and all laws or parts of laws inconsistent with the provisions of this act are hereby repealed.

The act of June 12, 1906 (34 Stat., 247), Public, No. 224, making appropriation for the support of the Army for the fiscal year 1907, provides:

For additional twenty per centum increase on pay of enlisted men serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto (excepting Porto Rico and Hawaii), as provided by act approved June thirtieth, nineteen hundred and two, the time of such service to be counted from the date of departure from said States to the date of return thereto, five hundred and forty thousand three hundred and sixty-nine dollars and forty-eight cents.

For additional ten per centum increase on pay of commissioned officers serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto (excepting Porto Rico and Hawaii), as provided by act approved June thirtieth, nineteen hundred and two, the time of such service to be counted from the date of departure from said States to the date of return thereto, two hundred thousand two hundred and one dollars and thirty-nine cents: *Provided*, That the appropriations for the pay of the Army for the fiscal years ending June thirtieth, nineteen hundred and five, and June thirtieth, nineteen hundred and six, shall be available for the payment of the increase for service at foreign stations to which commissioned officers and enlisted men are entitled under the provisions of the act of June thirtieth, nineteen hundred and two. * * *

By section 1612 of the Revised Statutes, officers and enlisted men of the Marine Corps are entitled to the same pay as or may be provided by law for officers and enlisted men of like grades in the Infantry of the Army, and by virtue of said section and the act of March 3, 1901 (31 Stat., 1108), they are entitled to the increase of pay provided by the act of June 30, 1902.

The act of April 23, 1904, which provided for an increase in the pay of commissioned officers and enlisted men of the Army serving in the Philippine Islands, Guam, Alaska,

China, and Panama did not operate as a repeal of the provision in the act of June 30, 1902, for an increase in the pay of commissioned officers and enlisted men of the Army serving beyond the limits of the United States; and therefore commissioned officers and enlisted men of the Marine Corps serving beyond the limits of the United States are entitled under the act of March 3, 1901, to the increased pay provided for by said act of June 30, 1902.

The act of June 30, 1902, declared that commissioned officers and enlisted men of the Army serving at stations beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto should receive the higher rate of pay, without limitation as to time. The act of April 23, 1904, without in any way referring to the act of June 30, 1902, made an appropriation to pay the higher rate of pay to commissioned officers and enlisted men serving at the particular places therein named, and it was held in the above decision that the latter act was not inconsistent with or repugnant to the act of June 30, 1902. In other words, the mere fact that Congress by the act of April 23, 1904, appropriated to pay the higher rate of pay to said officers and men serving in the places therein named did not abrogate or repeal the above provision of the act of June 30, 1902.

The act of April 23, 1904, did not refer to or mention the act of June 30, 1902, and it covered but a part of the subject matter of the act of June 30, 1902.

The act of June 12, 1906, covers the whole subject matter of the act of June 30, 1902, expressly refers to, and I am of opinion it is a limitation upon that act. I am of opinion that by the act of June 12, 1906, Congress intended to revise the class of beneficiaries as provided by the act of June 30, 1902, and to except therefrom all commissioned officers and enlisted men serving at stations in Porto Rico and Hawaii. In other words, by the act of June 12, 1906, for the fiscal year ending June 30, 1907, commissioned officers and enlisted men serving in Porto Rico and Hawaii are excepted from the class of beneficiaries provided by the act of June 30, 1902, and are not entitled to said higher rate of pay.

I am also of opinion that commissioned officers and enlisted men of the Marine Corps serving in Porto Rico, in-

cluding the island of Culebra as part of Porto Rico, and Hawaii during the fiscal year ending June 30, 1907, are not entitled for such service to the increased pay provided by the act of June 30, 1902. I am also of opinion that commissioned officers and enlisted men of the Marine Corps serving at stations in the island of Midway are entitled for such service to said higher pay, for the reason that, as I understand, said island is not a part of Hawaii.

APPENDIX C.

[14 Comp., 841–846.]

REENLISTMENT GRATUITY FOR REENLISTMENT IN PORTO RICO PROVISIONAL REGIMENT, FOREIGN-SERVICE PAY FOR SERVICE IN PORTO RICO AND HAWAII, AND EXTRA PAY FOR SERVICE ON ALASKAN CABLE AND TELEGRAPH SYSTEM IN ALASKA.

* * * * *

The increase of pay provided by the act of May 11, 1908, for foreign service of officers and enlisted men of the Army during the fiscal year 1900, is not payable to officers and enlisted men of the Regular Army and of the Porto Rico Provisional Regiment for service in Porto Rico and Hawaii after June 30, 1908.

* * * * *

The act of June 30, 1902 (32 Stat., 512), making appropriation for the support of the Army for the fiscal year 1903, provides:

For additional twenty per centum increase on pay of enlisted men, one million seven hundred and seventy-one thousand four hundred and eighty dollars and thirty-four cents.

For additional ten per centum increase on pay of commissioned officers serving at foreign stations, four hundred and fifty-one thousand four hundred and fifty-six dollars: *Provided*, That hereafter the pay proper of all commissioned officers and enlisted men serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law for time of peace, and the time of such service shall be counted from the date of departure from said States to the date of return thereto.

The act of June 12, 1906 (34 Stat., 247), making appropriation for the support of the Army for the fiscal year 1907, provides:

For additional twenty per centum increase on pay of enlisted men serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto (excepting Porto Rico and Hawaii), as provided by act approved June thirtieth, nineteen hundred and two, the time of such service to be counted from the date of departure from said States to the date of return thereto, five hundred and forty thousand three hundred and sixty-nine dollars and forty-eight cents.

For additional ten per centum increase on pay of commissioned officers serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto (excepting Porto Rico and Hawaii), as provided by act approved June thirtieth, nineteen hundred and two, the time of such service to be counted from the date of departure from said States to the date of return thereto, two hundred thousand two hundred and one dollars and thirty-nine cents: *Provided*, That the appropriations for the pay of the Army for the fiscal years ending June thirtieth, nineteen hundred and five, and June thirtieth, nineteen hundred and six, shall be available for the payment of the increase for service at foreign stations to which commissioned officers and enlisted men are entitled under the provisions of the act of June thirtieth, nineteen hundred and two. * * *

The act of March 2, 1907 (34 Stat., 1164), making appropriation for the support of the Army for the fiscal year 1908, contains a provision identical in terms with the act of June 12, 1906, except as to the amount appropriated.

In 13 Comp. Dec. 33, it was held that commissioned officers and enlisted men serving in Porto Rico and Hawaii during the fiscal year 1907 were excepted by the act of June 12, 1906, *supra*, from the class of beneficiaries provided by the act of June 30, 1902, *supra*, and were not entitled during said fiscal year to the increase of pay provided by said act of June 30, 1902, for service beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto. The same exception applies to men serving in said places during the fiscal year 1908.

The act of May 11, 1908 (Public, No. 112, pp. 6, 10), making appropriation for the support of the Army for the fiscal year 1909 provides:

* * * That increase of pay for service beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto shall be as now provided by law. * * *

For additional ten per centum increase on pay of officers on foreign service, two hundred and eighty-five thousand dollars.

For additional twenty per centum increase to enlisted men on foreign service, seven hundred and sixty-seven thousand dollars. * * *

The increase of pay for foreign service provided by law at the time of the approval of the act of May 11, 1908, was that authorized by the act of June 30, 1902, as limited by the act of March 2, 1907, making appropriation for the fiscal year 1908.

As under said laws increase of pay for foreign service was not given to commissioned officers and enlisted men serving in Porto Rico and Hawaii, such persons are not entitled to said increase of pay under the act of May 11, 1908, *supra*. The effect of the above provision in the act of May 11, 1908, is to continue the limitation imposed by the act of March 2, 1907, and under said provision I am of opinion that increase of pay for foreign service after June 30, 1908, is not payable to the officers and enlisted men of the Regular Army and the officers and men of the Porto Rico Provisional Regiment of Infantry serving in Porto Rico and Hawaii.

QUESTION 3.

The foreign service increase pay law in force is the act of June 30, 1902 (quoted above), as limited by the act of March 2, 1907, quoted, which limitation is continued in the act of May 11, 1908, under consideration. These laws are quoted and discussed under question two. The excepted places noted in the appropriation act of March 2, 1907, are Porto Rico and Hawaii.

Without determining whether the proviso in the act of March 2, 1901, quoted by the Paymaster General of the Army, is still in force, I think it evident that Congress intended by the provisions of the act of May 11, 1908, quoted by the Paymaster General, that for the fiscal year 1909 enlisted men of the line of the Army and enlisted men of the Signal Corps

of the Army employed in the Territory of Alaska on the Alaskan cable and telegraph system should, under the conditions named in the act, have extra pay as therein provided, notwithstanding such persons may at the same time be receiving or entitled to receive increase pay for foreign service under the laws providing therefor. The third question is answered accordingly.

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UNITED STATES *v.* VULTE.

APPEAL FROM THE COURT OF CLAIMS.

No. 256. Argued March 10, 1914; Restored to docket for reargument April 6, 1914; Reargued April 21, 22, 1914.—Decided May 4, 1914.

A statute which fixes the annual salary of a public officer at a designated sum without limitation as to time is not abrogated or suspended by subsequent enactments which merely appropriate a less amount for that officer for particular years and which contain no words expressly, or by clear implication, modifying or repealing the previous law. *United States* v. *Langston*, 118 U. S. 389.

A provision making a special and temporary appropriation will not be construed as expressing the intent of Congress to have a general and permanent application to all future appropriations. *Minis* v. *United States*, 15 Pet. 423.

The provision in the appropriation acts of 1906 and 1907 excepting Hawaii and Porto Rico from the operation of the provision for additional pay for officers in foreign service is not to be construed as prevailing over the explicit provisions of the act of June 30, 1902, providing for such additional pay including those places, and the salary provided by law of officers on foreign service referred to in the act of May 11, 1908, is that fixed by the act of June 30, 1902.

47 Ct. Cls. 324, affirmed.

THE facts, which involve statutes regulating the amount of additional pay of officers of the United States Navy for service beyond the seas, are stated in the opinion.

Mr. Assistant Attorney General Thompson for the United States:

Congress had the power to repeal general salary or compensation acts through special appropriation acts. When such a repeal is claimed the question is determined by the intention of Congress. *United States* v. *Fisher*, 109 U. S. 143; *United States* v. *Mitchell*, 109 U. S. 146; *Matthews* v. *United States*, 123 U. S. 184; *Wallace* v. *United States*, 133 U. S. 180; *McKinstry* v. *United States*, 40 Fed. Rep. 519.

The army appropriation act of April 23, 1904, was intended to redefine the definition of "foreign stations" given in the act of June 30, 1902, so as to exclude Porto Rico and Hawaii; it repealed the act of June 30, 1902, to that extent. See H. Rept. No. 4644, 59th Cong., 1st Sess., p. 3, vol. 4908; H. Repts. (public), 59th Cong., 1st Sess.; S. Rept. No. 1199, 58th Cong., 2d Sess., p. 8, vol. 4573, S. Repts. (public); 38 Cong. Rec., 58th Cong., II, pt. 4, pp. 3906, 3907, and pt. 5, pp. 4406–4470; *Irwin* v. *United States*, 38 Ct. Cls. 87, 98.

The cases relied on by the Court of Claims and cited in its opinion are not opposed to this conclusion. As to *Langston* v. *United States*, 118 U. S. 389, see *Belknap* v. *United States*, 150 U. S. 588, 595; and as to *Converse* v. *United States*, 26 Ct. Cls. 6, see *Carden* v. *United States*, 45 Ct. Cls. 171, 176.

Service beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto shall be as now provided by law under the act of May 11, 1908, 35 Stat. 110, and did not include service in Porto Rico or Hawaii.

The act of June 12, 1906, having been construed by the comptroller and the act of May 11, 1908, having been prepared with reference to the act of 1906, so far as the definition of foreign stations was concerned, must necessarily refer back to the territorial definition of foreign stations as set forth in the act of 1906 and as construed by the comptroller. *Sessions* v. *Romadka*, 145 U. S. 41, 42; *Claflin & Others* v. *Commonwealth Ins. Co.*, 110 U. S. 81; *The "Abbotsford,"* 98 U. S. 440; *Plummer* v. *United States*, 224 U. S. 137, 140.

The army appropriation acts of 1909, 1910, and 1911, respectively, simply make appropriation for services outside the limits of the United States and the Territories contiguous thereto in conformity with existing law as construed by the comptroller.

Since the passage of the act of 1906, the accounting officers of the Treasury have uniformly disallowed increased pay for service in Porto Rico and Hawaii. Such contemporaneous, uniform, and continuous construction is, we submit, entitled to great weight and should not be overruled without cogent reasons. *Brown* v. *United States*, 113 U. S. 568; *Schells, Executor*, v. *Fouche*, 138 U. S. 562; *Hewitt* v. *Shultz*, 180 U. S. 139; *United States* v. *Healey*, 160 U. S. 136; *United States* v. *Sweet*, 189 U. S. 471. When such construction has been approved by Congress, as was done by the act of 1912, it is conclusive.

Mr. George A. King, with whom *Mr. William B. King* was on the brief, for appellee.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The appellee, Nelson P. Vulte, filed a petition in the Court of Claims claiming to be entitled to $299.78, being ten per cent. of his regular pay for service beyond the seas. Judgment was entered in his favor for that amount, and the United States prosecuted this appeal.

The court found the following facts: Vulte was appointed second lieutenant in the Marine Corps June 30, 1903, and was promoted to first lieutenant March 3, 1904. Under orders assigning him for duty in Porto Rico with station at San Juan, he sailed from New York for Porto Rico June 27, 1908, and served there until November 3, 1909, when he was detached and ordered back to the United States. He was four days on the return voyage.

If it is held that he is entitled to ten per cent. for services in Porto Rico from the date of sailing from New York until the date of his detachment from duty at San Juan, there would accrue to him the sum of $296.72, and